No. 83-1894

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, AND ITS ROCKFORD AND BELOIT ASSOCIATIONS,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

AND

ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF ON BEHALF OF SAFEWAY STORES, INCORPORATED; CALIFORNIA PORSCHE-AUDI; SAN FRANCISCO AUTO CENTER; EUROPEAN MOTORS, LTD.; LUCAS DEALERSHIP GROUP; AND LYNCH COMMUNICATIONS SYSTEMS, INC. IN SUPPORT OF AFFIRMANCE

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The Daily Record Co., Baltimore, MD 21202

QUESTION PRESENTED

Whether the National Labor Relations Board and the United States Court of Appeals for the Seventh Circuit properly found that a union rule that restricts members from resigning from the union during a strike impermissibly abridges the statutory right of employees to refrain from engaging in union activities, and is therefore violative of Section 8(b)(1)(A) of the National Labor Relations Act, *as amended*.

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IDENTIFICATION OF PARTIES SUPPORTED

This *amicus curiae* brief is filed in full support of the positions asserted by the National Labor Relations Board (hereinafter referred to as "the NLRB" or "the Board") and by the Rockford-Beloit Pattern Jobbers Association (hereinafter referred to as "the Association" or "the

Employers"), the Respondents in this case.[1] We respectfully urge that this Court affirm the decision of the United States Court of Appeals for the Seventh Circuit which, in agreement with the Board, concluded that the Petitioners' restriction on its members' right to resign their Union membership during a strike violates Section 8(b)(1)(A) of the National Labor Relations Act, *as amended*.[2]

INTEREST OF AMICI CURIAE

Safeway Stores, Incorporated is currently signatory to more than 100 collective bargaining agreements with various labor unions whose members are covered by those agreements. California Porsche-Audi; European Motors, Ltd.; San Francisco Auto Center; and Lucas Dealership Group are automobile dealerships located in the State of California, each of whom has collective bargaining relationships with several labor organizations covering each dealership's non-supervisory employees. Lynch Communications Systems, Inc. is an electronic manufacturing corporation whose employees are similarly represented by a labor organization.

Most of these collective bargaining agreements contain union security provisions, requiring the employees

[1] We hereby certify that we have obtained the consent of all the parties, including the Solicitor General of the United States on behalf of the Respondent National Labor Relations Board, to file this Amicus Curiae Brief in support of the position of Respondents herein. Copies of the consents executed by the respective parties are attached hereto as Appendices to this Brief, and are filed simultaneously with the filing of this brief with the Court.

[2] 61 Stat. 136, 73 Stat. 519, 29 U.S.C., Section 158(b)(1)(A), which is quoted in relevant part on page 2 of the Petitioners' Brief. Hereinafter, the National Labor Relations Act is referred to as "the Act"; the Pattern Makers' League of North America, AFL-CIO, and its Rockford and Beloit Associations are collectively referred to as "the Union" or "the Petitioners." References to the records, appendices, and other relevant documents will conform to those in the Petitioners' Brief.

involved to join the union and remain union members throughout the life of the contract. Some of the unions with whom these employers have such collective bargaining relationships also have constitutional provisions similar to that at issue herein, restricting members' rights to resign, specifically during strikes. Moreover, these employers have been, and may in the future be, faced with union sponsored strikes and work stoppages. During such strikes, these employers receive numerous inquiries from employees, faced with financial hardship, who desire to exercise their statutorily guaranteed right to refrain from concerted activity,[3] but who have expressed an inability to exercise their right due to fear of substantial union fines.

Accordingly, as a party to these numerous collective bargaining agreements, and faced with strikes in which their employees' right to return to work is endangered by coercive union fines, each *amicus curiae* has a strong interest in protecting its employees' Section 7 rights, as well as resolving the lawfulness of restrictions upon these rights.

SUMMARY OF ARGUMENT

Unfair labor practice charges were filed by the Association against the Union arising out of the Union's imposition of substantial fines upon eleven employees employed by various employer members of the Association. These employees had resigned from the

[3] This right is embodied in Section 7 of the Act, 29 U.S.C. Section 157, which states, in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all such activities* . . .

(Emphasis added.)

Union during the course of a seven-month strike conducted by the Union during 1977, and had thereafter returned to work. At issue is the validity of a Bylaw enacted by the Union in 1976, known as "League Law 13," which purports to restrict the time during which a resignation may be submitted, as follows:

> No resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent.

(App. 28a n.3.)

It is the position of the *amici curiae* that the Labor Board and the Court of Appeals for the Seventh Circuit correctly concluded that "[t]he Section 7 right to refrain from union activities encompasses the right of members to resign from the union," and that "because League Law 13 completely suspends an employee's right to choose not to be a union member and thus no longer subject to union discipline, it frustrates the overriding policy of labor law that employees be free to choose whether to engage in concerted activities." (App. 5a-6a). Recognizing that unions have an interest in preserving strength during a strike, we nevertheless submit that such interest, which is neither embodied in the Act nor reflected in any of the extensive legislative history recited in the Petitioners' Brief, does not stand *in pari materia* with the *recognized, guaranteed statutory* right of the individual employee to refrain from participating in concerted activities. Accordingly, we urge that the interest of a union to adopt rules that are calculated to require that its employees-members stand "shoulder-to-shoulder" during a strike or a work stoppage must yield, when balanced against the statutory right of employees to refrain from union activities by resigning from union membership. Although we contend that such statutory right must always be found to override the unions' institutional self interests when the two

conflict, we note that such result is particularly warranted where, as here, employees sought to resign from union membership during the course of a protracted strike which had caused them substantial personal and financial hardship.

We show below, contrary to the contentions raised by the Petitioners in their brief, that the imposition of substantial fines upon employees who have attempted to resign their union membership in the midst of a protracted strike is clearly intended as a significant deterrent to the employees' attempt to resume employment contrary to the wishes of their Union. As such, these fines directly and proximately impinge upon the employment relationship so as to fall squarely outside the limited immunity afforded to labor organizations by the proviso to Section 8(b)(1)(A) of the Act, 29 U.S.C. Section 158(b)(1)(A), to "prescribe their own rules with respect to the acquisition or retention of membership therein."

Finally, we show that Petitioners' suggestion that employees are unconditionally bound by their unions' rules, including restrictions on their right to resign, is erroneously premised upon the notion that employees who become members of labor organizations do so freely and voluntarily, and that they are free to resign at times other than during periods of strikes or lockouts or when such activities are "imminent." Such a notion ignores the realities of the industrial workplace, which is that most employees — and certainly the employees involved in the case at bar — become and remain union members as the result of the explicit obligation contained in collectively bargained "union security" provisions, which require continuing union membership as a mandatory condition of their continued employment.

ARGUMENT

A. Restricting A Union Member's Right To Resign, And Enforcing That Restriction By Substantial Fines For Post-Resignation Conduct, Constitutes "Restraint And Coercion" Violative of Section 8(b)(1)(A) Of The Act.

In *N.L.R.B. v. Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO*, 409 U.S. 213 (1972), and later in *Booster Lodge No. 405, International Association of Machinists v. N.L.R.B.*, 412 U.S. 84 (1973), this Court held that a union violated Section 8(b)(1)(A) of the Act when it fined an employee who resigned from the union and then returned to work during a strike. In both cases, the unions fined employees who, having first resigned their membership, then crossed the union picket lines in the midst of a lengthy and economically disastrous strike.

The unions had contended that this Court's earlier decisions in *N.L.R.B. v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967), and *Scofield v. N.L.R.B.*, 394 U.S. 423 (1969), privileged such actions, on the ground that these fines fell within the "ambit of the union's control over its internal affairs."[4] The Court in *Granite State* rejected this contention, concluding that:

> The *Scofield* case indicates that the power of the union over the member is certainly no greater than the union-member contract. Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street.

409 U.S. at 217. Turning to the bitter realities recited in the facts of that case, the Court then noted that most of the affected employees who chose to resign their membership and work behind the union picket line did so after the seventh month of a strike which "was still in progress 18 months after its inception":

> Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident. . . . [W]e conclude that the vitality of Section 7 requires that the member be free to refrain in November from the actions he endorsed in May and that his Section 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime.

409 U.S. at 217-18.

As a direct response to this Court's repeated refusal to permit unions to impose disciplinary sanctions upon

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[4] In *Allis-Chalmers*, this Court upheld the right of unions to punish *members* whom it found to have violated explicit union rules prohibiting, e.g., working behind a union-sanctioned picket line, which it considered an exercise of their recognized right to "protect against erosion of their status . . . through reasonable discipline of members who violate rules and regulations. . ." 388 U.S. at 181.

In *Scofield*, this Court noted that while "a union rule, duly adopted and not the arbitrary fiat of a union officer, forbidding the crossing of a picket line during a strike was therefore enforceable against *voluntary* union members by expulsion or a reasonable fine," 394 U.S. at 428 (emphasis added):

> If a member chooses not to engage in this concerted activity and is unable to prevail on the other members to change the rule, then he may leave the union . . .

394 U.S. at 435. Thus, as this Court further noted:

> Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members *who are free to leave the union and escape the rule*. This view of the statute must be applied here.

394 U.S. at 430 (emphasis added).

employees who, in the words of the *Scofield* Court, left their union in order to "escape the rule," many unions, including the Pattern Makers League, were quick to adopt constitutional or bylaw provisions that have the intention and effect of locking employees into their union membership during strikes or lockouts, or when such events appeared "imminent," without the opportunity freely to resign. However, the Board on at least three different occasions has rejected union attempts to accomplish, by the mere insertion of restrictive language regarding resignation, the indirect restriction of resignation rights which this Court would not permit directly in *Scofield* and *Granite State*.[5]

In the first such case, *Machinists Local 1327 (Dalmo-Victor)*, 231 NLRB 719 (1977), *rev'd and remanded* 608 F.2d 1219 (9th Cir. 1979), *on remand*, 263 NLRB 984 (1982), *enforcement denied*, 725 F.2d 1212 (9th Cir. 1984), *petition for cert. pending*, four of the five Board members concluded (Member Jenkins dissenting) that an amendment promulgated by the International Association of Machinists in its constitution as a response to this Court's *Granite State* decision[6] constituted a violation of Section

[5] In a concurring opinion in *Granite State*, 409 U.S. at 218, Chief Justice Burger made the following pertinent observations:

> The balance is close and difficult; unions have need for solidarity and at no time is that need more pressing than under the stress of economic conflict. Yet we have given special protection to the associational rights of individuals in a variety of contexts; through Section 7 of the Labor Act, Congress has manifested concern with those rights in the specific context of our national scheme of collective bargaining. *Where the individual employee has freely chosen to exercise his legal right to abandon the privileges of union membership, it is not for us to impose the obligations of continued membership.*

(Emphasis added.)

[6] The amendment provided, in pertinent part, that "resignation would not relieve a member of his obligation to refrain from accepting employment . . . in an establishment where a strike or lockout exists . . . for the duration of the strike or lockout or within 14 days preceding its commencement."

8(b)(1)(A) of the Act.[7] In so ruling, Board Members Fanning and Zimmerman reasoned that:

> [T]he Supreme Court's remarks in *Granite State*, read in conjunction with the *Scofield* requirement that union members must be free to leave the union and escape the rule, lead inescapably to the conclusion that a member's right to resign from a union applies both to strike and nonstrike situations. We hold today that a union rule which limits the right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction on a member's Section 7 right to resign.

263 NLRB at 986.

Then-Chairman Van de Water and Member Hunter, in a lengthy concurring opinion in *Dalmo-Victor*, offered the following further analysis which led them to conclude that any restriction imposed upon a union member's right to resign was unreasonable and thus violative of Section 8(b)(1)(A):

> [O]nce an employee becomes a union member, he cannot be bound forever to the rules and coercive force of the union, but must be allowed to change his mind based upon subsequent developments. . . .
>
> * * * * * *

[7] Two of the four majority Members (former Member Fanning and Member Zimmerman) had concluded that "the right of union members to resign is not absolute," and, in the interest of protecting the union's "right" to maintain its strike objectives they created a rule permitting unions to restrict resignations for up to 30 days. 263 NLRB at 987. Member Hunter and former Chairman Van de Water, however, would have found illegal *any* restriction on a union member's right to resign. 263 NLRB at 992-93.

All four Board Members, however, agreed in *Dalmo-Victor* that the restriction upon resignation contained in the Machinists Union's Constitution clearly violated Section 8(b)(1)(A) of the Act.

> Surely a union is vested with sufficient lawful means of persuasion and peer pressure to preserve strike solidarity without requiring suspension of the Act's fundamental protections. In fact, if a union is unable to preserve strike solidarity through less restrictive means than sanctions that override the Act's protections, perhaps it should reconsider its decision to strike in the first place.

263 NLRB at 990, 991 n.47.[8]

Finally, the concurring Board Members rejected the union's contention that the institutional interests of the union in preserving "strike solidarity" stood on equal footing with the statutory right of individual member-employees to refrain from continuing their support for their union or its strike:

> [T]he substantial diminution of express statutory rights is warranted only when the statutory right collides with a corresponding *right* of relatively

[8] In an insightful commentary written shortly after the Board issued its first ruling in *Dalmo-Victor*, Professor Harry H. Wellington expressed similar doubts as to the need for unions to enforce "strike solidarity" by forcing employees to remain members and punishing those employees who, trapped into continued membership against their will, nevertheless seek to alleviate their financial and personal hardship by resuming employment in the midst of a lengthy strike:

> It is difficult to believe that union leaders are so far removed from their rank and file that they cannot predict how many deserters they will encounter during a strike. To the extent that union officials do have honest doubts about their capacity to wage protracted economic war (a source of concern if one accepts the underlying rationale of *Allis-Chalmers* [*supra*]), they could poll their membership in a secret ballot. Moreover, unions are meant to be democratic institutions. If unfettered freedom to resign so depletes a union's ranks over time that the strength of its strike is sapped, one is tempted to say that the members have spoken, the consensus has evaporated, and the strike should come to an end.

Wellington, *Union Fines and Workers' Rights*, 85 YALE L.J. 1022, 1044-45 (1976) (footnote omitted).

> equal import and legal significance. We contend most strongly that the express Section 7 rights of employees are surely more than mere "interests" subject to limitation because their operation somehow impinges upon the institutional desires of a union. Conversely, a union's institutional *interests*, to our knowledge, have never been elevated to the point where they stand on equal footing with, and, indeed, override and negate the fundamental protections of Section 7. . . .

263 NLRB at 990-91 (emphasis in original; footnote omitted).

Scarcely three months after it issued its decision in *Dalmo-Victor*, a unanimous Board, this time consisting of Chairman Van de Water and Members Fanning, Hunter and Zimmerman, concluded in the case at bar that League Law 13, which attempted to restrict resignation of the League's members during periods of strikes, lockouts, or when such events appeared "imminent," contravened Section 8(b)(1)(A) of the Act. The Court of Appeals for the Seventh Circuit affirmed the Board's decision (App. 1a-8a) and granted enforcement of its remedial order requiring the Union to "[c]ease and desist from giving force and effect to League Law 13" and "imposing fines and other penalties upon former members for conduct in which they engaged after their effective resignation from [the Union]." (App. 17a.)

Finally, in June 1984, the Board for a third time struck down, as violative of Section 8(b)(1)(A), a union's attempt to restrict its members' right to resign during a strike in order to return to work without fear of monetary sanctions. In *International Association of Machinists and Aerospace Workers, Local Lodge 1414 (Neufeld Porsche-Audi, Inc.)*, 270 NLRB No. 209, 116 LRRM 1257 (1984), a Board majority consisting of Chairman Dotson and Members Hunter and Dennis reaffirmed the Board's earlier rulings on the issue, determining that:

> [W]hen a union seeks to delay or otherwise impede a member's resignation, it directly impairs the employee's Section 7 right to resign or otherwise refrain from union or other concerted activities. In addition, by creating the fiction of continued membership, restrictions on resignations undermine the policies of Section 8(b)(2)[9] and the second proviso to Section 8(a)(3)[10] that serve to prohibit a union from compelling full membership.
>
> Similarly, restrictions on resignation also impair the fundamental policy repeatedly recognized by the Supreme Court to be imbedded in the very fabric of the labor laws that distinguishes between internal union actions and external union actions. . . . By unilaterally extending an employee's membership obligation through restrictions on resignation a union artificially expands the definition of internal action and can thus

[9] Section 8(b)(2) of the Act, 29 U.S.C. Section 158(b)(2), makes it an unfair labor practice for a union:

> to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Notably, in the instant case, the Board's finding that the Union violated this section of the Act by refusing to readmit one of the employees who returned to work during the strike and by thereafter urging his employer to discharge him in accordance with the union security provisions contained in the parties' collective bargaining agreement (App. 15a-16a) has not been contested by the Union, either in the Circuit Court of Appeals or before this Court.

[10] The second proviso to Section 8(a)(3) of the Act, 29 U.S.C. Section 158(a)(3), states, in relevant part:

> That no employer shall justify any discrimination against an employee for non-membership in a labor organization . . . (B) if he has reasonable grounds for believing that such membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

> continue to regula nduct over which it would otherwise have no control. We find no basis in the Act for allowing unions to alter unilaterally the statutory structure so carefully elucidated by the Supreme Court.

116 LRRM at 1260 (footnote omitted).

In sum, over the past two years, three separate Board panels comprising a total of six (6) different Members whose views reflect the entire political spectrum from liberal to conservative,[11] have unequivocally rejected, as unlawful, attempts by labor unions to restrict the rights of their members freely to resign from membership. They have so ruled even where the resignations have occurred during periods such as strikes or lockouts when, admittedly, the institutional need of those organizations for "solidarity" is paramount.

It is disingenuous, we submit, for the Union to rely upon the aberrational decision of the Ninth Circuit in the second *Dalmo-Victor* case (*Machinists Local 1327 v. N.L.R.B.*, 725 F.2d 1212 (1984)), for the proposition that League Law 13 falls comfortably within the protection of the proviso to Section 8(b(1)(A), which "reserves to unions the power to make reasonable rules regarding the retention and acquisition of membership," and that, accordingly, fines against employees for accepting post-

[11] Former Member Fanning, a Democrat who ruled to strike down the Machinists Union's restrictive provisions regarding resignation during strikes in the *Dalmo-Victor* case, and who also concurred with the Board majority in the instant case, was appointed to his last term by former President Carter. Member Zimmerman, an Independent who joined Member Fanning in the majority decision in *Dalmo-Victor*, as well as the majority opinion in the case at bar, was likewise appointed by President Carter. Former Chairman Van de Water and Member Hunter, who wrote concurring opinions in *Dalmo-Victor*, as well as the opinion in the case at bar, are Republicans who were appointed by President Reagan. Current Board Chairman Dotson, a Republican, and Member Dennis, a Democrat, both of whom joined the majority opinion in *Neufeld Porsche-Audi, supra*, were also appointed by President Reagan.

resignation employment with the struck employer do not constitute "coercion" within the contemplation of the Act (Petitioners' Brief, p. 8, *quoting* 725 F.2d at 1216). Rather, as the Court observed in *N.L.R.B. v. The Boeing Company*, 412 U.S. 67 (1973), contrary to the Union's contention herein, "all fines are coercive to a greater or lesser degree." 412 U.S. at 73. Thus, resolution of the issue herein centers not upon whether these particular fines might be deemed "coercive" but, rather, on whether union imposition of such fines could necessarily be said to impinge upon the employment relationship. Thus, the *Boeing* Court held that:

> The underlying basis for the holdings of *Allis-Chalmers* and *Scofield* [*supra*] was not that reasonable fines were non-coercive under the language of Section 8(b)(1)(A) of the Act, but was instead that those provisions were not intended by Congress to apply to the imposition by the union of fines not affecting the employer-employee relationship and not otherwise prohibited by the Act. . . .
>
> * * * * * *
>
> At least since 1954, it has been the Board's consistent position that it has "not been empowered by Congress . . . to pass judgment on the penalties a union may impose on a member so long as the penalty does not impair the member's status as an employee." . . .

412 U.S. 73, 74-5 (footnotes and citations omitted).

We can imagine no greater imposition upon a member's status as an employee, nor a greater effect upon the employer-employee relationship as envisioned by this Court in *Boeing*, *Scofield*, *Granite State*, and their progeny, than a union rule that purports to restrict a member's right to resign, thereby subjecting that member to substantial fines should he exercise his right to abandon a strike in order to return to work to feed his

family. Indeed, in this very case, the Board's Administrative Law Judge found that one of the affected employees was fined "$4,200 for damages due injury the Beloit Association for deserting the strike by returning to work" (App. 29a), while the other ten (10) individuals who attempted to resign their membership in order to return to work were fined in an amount "approximately commensurate with their earnings . . . for returning to work during the strike." (App. 28a.) If the cost of returning to work is most, all of, or even more than, the amount the employee stands to earn by doing so, no employee can safely accept employment for the duration of any strike, no matter how long the strike lasts and without regard to the economic hardships imposed upon him and his family or the imminence of his being permanently replaced by his employer. *See N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *Belknap, Inc. v. Hale*, ___ U.S. ___, 103 S. Ct. 3172, 3177 (1983).

Surely, there are far less coercive means of enforcing a union's legitimate objective of group solidarity[12] during a strike than by depriving an employee of his livelihood through the use of fines equal to or greater than his strike-period earnings. Aside from the not inconsiderable peer pressure placed upon the employee by his fellow workers, such less coercive means include suspension or even expulsion from the union. While Section 8(a)(3) of the Act[13] protects an employee from losing his job as a result

[12] While we agree that the desire to stand "shoulder-to-shoulder" during a strike is an important union interest, this interest is significantly diminished in the circumstances of the so-called "sympathy" strike. In such situations, an employee may be forced to remain out of work during the life of a collective bargaining agreement, which is intended to protect him from strikes or lockout, due to a dispute which has nothing whatsoever to do with his employment. *See Buffalo Forge Co. v. United Steeworkers of America, AFL-CIO*, 428 U.S. 397 (1976).

[13] 29 U.S.C. Section 158(a)(3). *See* footnote 10, *supra*, for the text of its relevant proviso regarding discrimination by employers against employees for "non-membership in a labor organization."

of such union action,[14] nevertheless there are both tangible and intangible losses associated with loss of union membership which a union member must weigh before determining whether mid-strike resignation is appropriate. Those losses may include, *inter alia*, the loss

[14] Under the Supreme Court's decision in *N.L.R.B. v. General Motors Corp.*, 373 U.S. 734, 742 (1963), "'membership' as a condition of employment has been whittled down to its financial core." As this Court further observed:

> It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. . . .

Id. In his excellent article on the subject, Professor Wellington refers to *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17 (1954), where the Court noted that except for the payment of union dues and fees provided for under a valid union security agreement, "No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned. [347 U.S. at 41-2.]" *Wellington, supra,* at 1050. He then goes on to note that:

> [A]s a matter of federal labor policy, the conclusion that a worker may not be discharged for resigning is consistent with the overriding intent of both Section 8(a)(3) and Section 8(b)(1)(A) to separate employment rights from union rights. Just as union discipline cannot be enforced by either actual or threatened job discrimination, it seems clear that no union security clause, however broad, can justify discharge of a former member who has resigned to escape union discipline, so long as he meets his minimal financial obligations.

Id. at 1050-51 (footnotes omitted).

Unfortunately, as we discuss more fully at pages 19-22, *infra*, most union members are not sufficiently familiar with this rather sophisticated concept of labor law to understand or appreciate their legally recognized right to resign their union membership while still continuing to pay periodic dues in accordance with the union security clause of their employer's collective bargaining agreement. *See N.L.R.B. v. Hershey Foods Corp.*, 513 F.2d 1083 (9th Cir. 1975); Ogden, *Dalmo-Victor: A Troubled Sleep Deserves a Hershey Kiss*, 35 LABOR L.J. 374 (1984).

of union benefits,[15] including pensions, insurance, strike benefits, medical facilities, recreation centers, and dependents' scholarships, as well as the right to attend union meetings and social functions or to be heard within the union's councils, the right to hold union office, and the opportunity to participate in the formulation of bargaining proposals and to vote for or against a proposed contract once it has been agreed upon at the bargaining table. *General Motors*, 373 U.S. at 737.[16]

Discouraging employees from accepting employment by means of disciplinary fines is no less coercive than a union's overt attempt to force an employee to forego his right to refrain from supporting its strike by threats and intimidation.[17] *General Motors, supra; Hershey Foods, supra*. Both forms of conduct, we submit, are unlawful, and cannot be condoned by this Court.

[15] Such benefits would not, of course, include any that are provided pursuant to a collective bargaining agreement between the union and the employee's employer.

[16] For a more detailed discussion of the effects of resignation upon the employee-member, see Wellington, *supra*, at 1045-48.

[17] Indeed, as recently as November 7, 1984, a unanimous Board panel consisting of Chairman Dotson and Members Zimmerman and Dennis determined, contrary to the agency's administrative law judge, that a union which sought to impose a reinitiation fee upon two members who had previously resigned their membership but sought to rejoin in order to comply with the terms of their employer's union security agreement with the union, did so in derogation of the employees' Section 7 "right to refrain from joining unions as full members and to meet only their financial core obligations." The Board, therefore, concluded that "the imposition of the additional initiation fees on the Charging Parties acted as a penalty for the exercise of their Section 7 rights." *Professional Engineers Local 151 (General Dynamics Corp.)*, 272 NLRB No. 164, 117 LRRM 1443, 1444 (1984).

B. THE PETITIONERS' CONTENTION THAT MEMBERSHIP IN LABOR UNIONS IS ENTERED INTO FREELY AND VOLUNTARILY IS MISLEADING AND ERRONEOUS.

The Petitioners rely heavily upon the notion (*see* Petitioners' Brief, pp. 34-38) that the Union's constitutional restriction against resignation is further justified by common law concepts concerning the right of voluntary associations to restrict the conditions under which their members may resign their membership. To support this contention, the Petitioners recite a line of cases in which various courts have determined that voluntary associations such as country clubs, medical societies, and automobile dealership advertising consortia were free to promulgate rules restricting the manner and method in which members could tender their resignation from those associations. The common thread in those cases, however, is that the persons who sought to resign their membership from the particular organization *"voluntarily* submitted to the rule of the . . . majority." *Leon v. Chrysler Motors Corporation,* 358 F. Supp. 877, 885 (D.N.J. 1973) (emphasis added).[18]

Clearly, the linchpin of each of these cases and, indeed, of the Petitioners' argument regarding the applicability of the common law of voluntary associations, is the *freedom*

[18] Indeed, there is serious doubt as to the efficacy of associational restrictions upon its members' right to resign, even assuming, *arguendo,* that its members do, in fact, freely and voluntarily enter the association. According to one leading treatise referred to by the Petitioners in their Brief (at p. 36):

> A member may lawfully resign at any time from an association or club and terminate his liability for dues and fees, upon payment of all accrued charges, *and a bylaw which restricts this right or makes the withdrawal subject to the organization's approval is invalid.* . . .

6 AM. JUR. 2D Associations and Clubs, Section 26 (1963), *citing Haynes v. Annandale Golf Club,* 110 Cal. App. Supp. 765, 289 P. 806 (1930) (emphasis added).

and *voluntariness* with which members joined their respective associations. Thus, Petitioners argue:

> Each member joined the Unions, or retained his membership *when free to resign,* with the understanding that he was *agreeing* not to resign during a strike or when a strike appeared imminent, and with the further understanding that other members were *agreeing* to be similarly bound.
>
> * * * * * *
>
> While *no employee in the bargaining unit is required to join the union in the first place,* once he joins and begins receiving the benefits of union membership, the fundamental law of associations dictates that he may be bound by a union resignation rule of the kind at issue here, *to which he agreed* . . . requiring him to continue his membership . . .

(Petitioners' Brief, p. 38; emphasis added.)

The underscored language recited above reflects the Petitioners' misleading and erroneous premise that, like members of a golf club or medical society, union members acquire their membership *voluntarily,* and that they are free to leave at times other then periods of strikes, lockouts, or when such events are "imminent." As we show below, this premise is clearly invalid.

According to a recent comprehensive survey conducted by the Bureau of National Affairs of over 400 collective bargaining agreements from across the U.S. covering bargaining units which include 50 or more employees, some 73 percent of those contracts contained either union shop or modified union shop provisions *requiring employees to become and remain members of a labor union as a condition of their continued employment.*[19] To the average

[19] Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts,* vol. 2 pp. 87:1-87:4 (1983).

worker covered by such provisions, which are contained in a collective bargaining agreement dictating the terms and conditions of his employment, mandatory membership requires not simply that the employee pay an initiation fee and periodic monthly dues, but that he join the union, thereby assuming whatever might be the duties and obligations of union membership, as well.

Most contractual union security agreements, including the provisions contained in collective bargaining agreements between the League and the Union in the case at bar, are silent with respect to the rights of members to resign from full membership, retaining only their "financial core" obligations to pay periodic dues and initiation fees. Indeed, the only class of union security provision that affirmatively notifies the worker of his limited financial obligation is the "agency shop" clause, under which employees are not required to join the union, but merely to pay a service charge equal to or less than union dues. However, the "agency shop" clause, according to the above-referenced survey of nationwide collective bargaining agreements, appears in only five percent of the contracts surveyed.[20]

As Professor Wellington has observed:

> [M]ost union security clauses fail to inform the worker that his statutory obligation is limited to payment of dues. This failure is hardly surprising. . . . There is little reason to believe that the average worker, confronted with an over-inclusive union security clause, a silent union constitution, and ambiguous Supreme Court statements will have the faintest glimmer of his right to immunize himself from union discipline. Today, as in 1967 when Mr. Justice Black first noted the problems inherent in the "full membership" concept "[f]ew employees forced to become 'members' of the union by virtue of the union security clause will be aware

[20] *Id.* at 87:2.

> of the fact that they must somehow 'limit' their membership to avoid the union's court-enforced fines." . . .[21]

Simply put, the average worker cannot be expected to discern the difference between "financial core membership" — that is, an employee's right, recognized in Section 8(a)(3) of the Act, to whittle down his obligation to his union under the governing collective bargaining agreement to simply paying periodic dues and initiation fees — and "full-fledged" membership, which includes the obligation to submit to the full panoply of union rules and regulations, from which he might indeed escape during the life of his employer's labor contract. As this case demonstrates, there is absolutely no evidence that the Union informed those members who later sought to resign that they were free to resign their full-fledged membership at any time prior to the imminence of a strike or lockout, as Petitioners here suggest. (Petitioners' Brief, p. 38.)

So long as unions do not affirmatively disclose to newly hired employees of unionized establishments — by a specific constitutional provision, by less all-encompassing union security agreements, or by clear and unambiguous written notification at the time the union membership requirement is imposed — that they are free to resign their membership at any time before a strike or lockout appears "imminent," employees who undertake employment for an employer whose collective bargaining agreement contains a traditional union shop provision cannot be expected to know and appreciate any so-called "freedom to resign." To the contrary, prior decisions of this Court

[21] Wellington, *supra*, at 1051-52, citing and quoting from *Allis-Chalmers*, 388 U.S. at 215 (Black, J., dissenting). *See also Evans v. American Federation of Television & Radio Artists*, 354 F. Supp. 823 (S.D.N.Y. 1973), *rev'd and remanded sub nom. Buckley v. American Federation of Television & Radio Artists*, 496 F.2d 305 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974).

have tended to obscure, rather than to emphasize, the financial core obligations so fervently espoused by the Petitioners in their Brief. Thus, this Court has suggested that even those employees who join labor unions and retain their membership in those organizations solely under the assumption that such membership is a condition of their continued employment, are *presumed* to have undertaken full-fledged membership, absent clear evidence to the contrary. *Allis-Chalmers*, 388 U.S. at 196-97, *citing International Association of Machinists v. Street*, 367 U.S. 740, 774 (1961).

It is sheer sophistry for the Petitioners to suggest that their members joined "freely and voluntarily" and thereby agreed to be bound by Union rules and regulations. To the contrary, the typical employee's initial decision is not to join or not join the union, but rather is to accept or not accept a job with a unionized employer, governed by a union security provision. Accordingly, in most cases, an employee-member has *not* voluntarily chosen to join the union, but instead has voluntarily chosen to work for an employer, and joins the union merely as an imposed condition of that employment. Petitioners' reliance upon cases purporting to construe the "common law of voluntary associations" is, therefore, utterly misplaced and should be rejected by this Court.

CONCLUSION

For the foregoing reasons, Safeway Stores, Incorporated; California Porsche-Audi; San Francisco Auto Center; European Motors, Ltd.; Lucas Dealership Group; and Lynch Communications Systems, Inc. urge the Court to affirm the decision of the Court of Appeals upholding the Board's finding that the enforcement of League Law 13 against employee-members who attempt to resign their union membership during the course of a strike constitutes conduct violative of Section 8(b)(1)(A) of the Act.

Respectfully submitted,

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Attorneys for Amici Curiae Safeway Stores, Incorporated; California Porsche-Audi; San Francisco Auto Center; European Motors, Ltd.; Lucas Dealership Group; and Lynch Communications Systems, Inc.

December 1984

APPENDIX

APPENDIX 1

AMERICAN FEDERATION OF LABOR AND CONGRESS
OF INDUSTRIAL ORGANIZATIONS

(Logo)

815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000

November 19, 1984

Carol R. Caine, Esq.
Littler, Mendelson, Fastiff & Tichy
650 California Street, 20th Floor
San Francisco, CA 94109-2693

Re: *Pattern Makers, et al v. NLRB, et al.*, No. 83-1894

Dear Ms. Caine:

On behalf of the petitioners in the above-noted case, I hereby consent to your request to file a brief *amicus curiae* in support of the position of the respondents; my consent is premised on the understanding that the brief will be filed on or before the due date for respondents' brief.

Sincerely,

LAURENCE GOLD,
Counsel of Record.

FAHY & CHENEY, LTD.
Attorneys at Law
Suite 202
303 North Main Street
Rockford, Ilinois 61101

NOV 26 1984
(Stamped Date)

November 19, 1984

Wesley J. Fastiff, Esq.
Littler, Mendelson, Fastiff & Ticky
Attorneys at Law
20th Floor
650 California Street
San Francisco, California 94108

Re: *Pattern Makers' League of North America, AFL-CIO, et al. v. National Labor Relations Board and Rockford-Beloit Pattern Jobbers Association,* No. 83-1894

Dear Mr. Fastiff:

In response to your telephone request, Respondent, Rockford-Beloit Pattern Jobbers Association consents to your filing an *amicus curiae* brief in the above-captioned case on behalf of Safeway Stores, Inc., European Motors, California Porsche-Audi Lincoln-Mercury, San Francisco, California, Auto Center, Lucas Dealership Group and Lynch Communications Co., Inc. and supporting the position of Respondents.

Very truly yours,

FAHY & CHENEY, LTD.,
EDWARD J. FAHY,
Attorney for Rockford-Beloit
Pattern Jobbers Association.

EJF:lkj

cc: Lawrence Gold, Esq.
Rex E. Lee Esq.
Wilford W. Johansen, Esq.
Norton J. Come, Esq.

(Logo)

U.S. DEPARTMENT OF JUSTICE
Office of the Solicitor General
Washington, D.C. 20530

November 20, 1984

Carol R. Caine, Esq.
Littler, Mendelson, Fastiff & Tichy
650 California Street, 20th Floor
San Francisco, California 94108-2693

Re: *Pattern Makers' League of North America, et al. v. National Labor Relations Board, et al.,* No. 83-1894

Dear Ms. Caine:

As requested in your letter of November 13, 1984, I hereby consent to the filing of a brief *amicus curiae* on behalf of Lucas Dealership Group and Lynch Communications Systems, Inc. (Nev.).

Sincerely,

REX E. LEE,
Solicitor General.

APPENDIX 4

U.S. DEPARTMENT OF JUSTICE
(Logo) Office of the Solicitor General
Washington, D.C. 20530

November 6, 1984

Carol R. Caine, Esq.
Littler, Mendelson, Fastiff & Tichy
650 California Street, 20th Floor
San Francisco, California 94108-2693

Re: *Pattern Makers' League of North America, et al. v. National Labor Relations Board, et al.*, No. 83-1894

Dear Ms. Caine:

As requested in your letter of October 30, 1984, I hereby consent to the filing of a brief *amicus curiae* on behalf of Safeway Stores, Incorporated, California Porsche-Audi, San Francisco Auto Center and European Motors, Ltd.

Sincerely,

REX E. LEE,
Solicitor General.